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No. 89-1813

Supreme Court, U.S.

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ROBERT E. SPANIOLO, J.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

HARRY G. JOHN, as a Director
and Trustee of DE RANCE, INC.,

Petitioner,

v.

ERICA P. JOHN, as an Officer and Director of DE RANCE,
INC., a Wisconsin Non-Stock, Non-Profit Corporation,
and DONALD A. GALLAGHER, as an Officer, Director and
Trustee of DE RANCE, INC.,

- Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Wisconsin

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Wisconsin courts erred in determining that petitioner should be removed as an officer and director of De Rance, Inc., a charitable foundation, upon a determination that he had engaged in repeated acts of fraud, self-dealing, and waste of the foundation's assets.

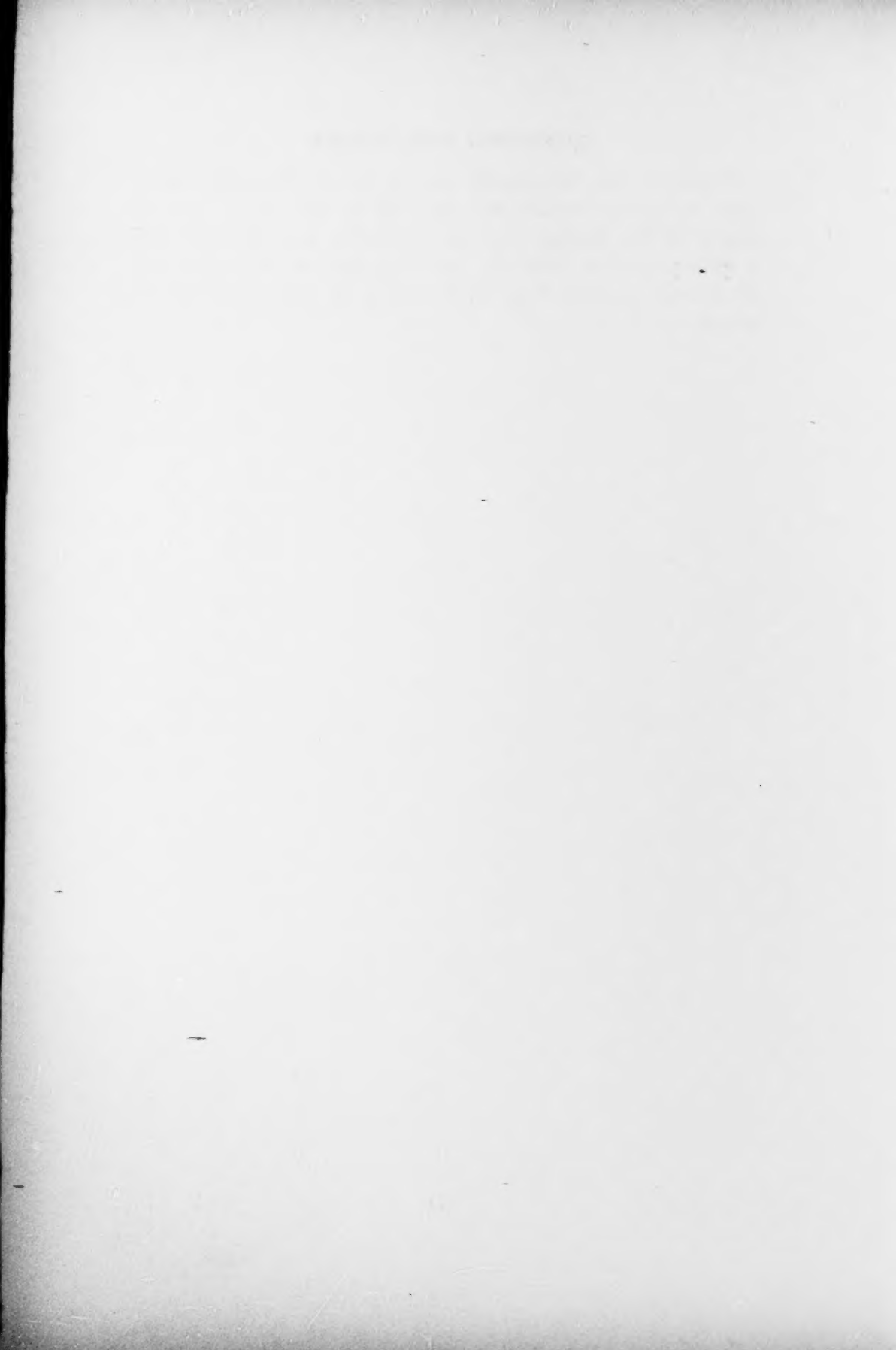


TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
I. THE PETITION IS NOT SUITABLE FOR SUPREME COURT REVIEW	2
A. The Petition Does Not Comply With Rule 10..	2
B. The Petition Raises Issues Not Presented To The Appellate Courts Below	4
C. The Supreme Court Does Not Review State Court Decisions Based Upon Purely State Law Grounds	4
D. The Supreme Court Does Not Evaluate Testi- mony Or Weigh Competing Evidence Pre- sented To The Trial Court	5
II. THE PETITION IS FRIVOLOUS	6
A. The Petition Does Not State A Violation Of The Due Process Clause	6
B. The Seventh Amendment Does Not Guarante- tee A Jury Trial In A State Equity Pro- ceeding	6
C. The First Amendment Does Not Guarantee A Right To Defraud A Tax-Exempt Charity..	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	Page
<i>Atlas Roofing Co. v. Occupational Health and Safety Review Comm'n</i> , 430 U.S. 442 (1971).....	7-8
<i>Employment Div., Dept. of Human Resources of Oregon v. Smith</i> , — U.S. —, 110 S. Ct. 1595 (1990)	8-9
<i>Ernst & Ernst v. Hochfelder</i> , 425 U.S. 185 (1976) ..	4
<i>In re Heritage Village Church</i> , 92 Bankr. 1000 (D.S.C. 1988)	9
<i>John v. Barron</i> , 897 F.2d 1387 (7th Cir. 1990)	6
<i>John v. John</i> , 153 Wis. 2d 843, 450 N.W.2d 795 (Ct. App. 1989), review denied, 153 Wis. 2d xlv (1990)	2
<i>Minneapolis & St. Louis R.R. v. Bombolis</i> , 241 U.S. 211 (1916)	7
<i>N.L.R.B. v. Pittsburgh Steamship Co.</i> , 340 U.S. 498 (1951)	5
<i>Tennessee v. Dunlap</i> , 426 U.S. 312 (1976)	4
<i>United States v. Moon</i> , 718 F.2d 1210 (2d Cir. 1983)	9
<i>Wagner Co. v. Lyndon</i> , 262 U.S. 226 (1923)	7
 CONSTITUTIONAL PROVISIONS:	
First Amendment	8-9
Seventh Amendment	6-8
Fourteenth Amendment (Due Process Clause)	4
 STATUTES:	
Internal Revenue Code (26 U.S.C.)	
§ 501(c)(3)	1
§ 509(a)	1
 WISCONSIN STATUTES:	
§ 776.32(4)	2
§ 801.58	6
§ 809.62(1)	3

TABLE OF AUTHORITIES—Continued

<i>RULES:</i>	Page
Fed. R. Civ. P. 11	6
Sup. Ct. R. 10	2-3, 5, 6
 <i>OTHER AUTHORITIES:</i>	
<i>The Federalist</i> No. 83 (A. Hamilton)	7



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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Harry G. John was a trustee and director of De Rance, Inc., a tax-exempt, non-profit, non-stock Wisconsin corporation. De Rance, Inc. was classified by the Internal Revenue Service as a charitable organization and a private foundation subject to the applicable provisions of sections 501(c)(3) and 509(a) of the Internal Revenue Code of 1954, as amended. Record at 199.

On August 21, 1986, after a five month trial in the Wisconsin Circuit Court, petitioner was removed from

his offices as trustee and director of De Rance, Inc. The trial court found and determined that petitioner had committed gross misconduct, the sole ground for removal from corporate positions, as set forth in section 776.32(4), Wis. Stats. Record at 199.

In 97 pages of detailed findings of fact and conclusions of law, the trial court determined that petitioner had engaged in numerous acts of perjury, securities fraud, tax fraud, self-dealing, conflicts of interest, corporate fraud, deception and disobedience of the De Rance board of directors, waste of corporate assets, breaches of fiduciary duty, and mismanagement. Petitioner was also ordered to disgorge \$1,171,097 in illegal profits from his prohibited acts of self-dealing. Record at 199.

The trial court's decision and findings were affirmed by the Wisconsin Court of Appeals in *John v. John*, 153 Wis. 2d 343, 450 N.W.2d 795 (Ct. App. 1989). Review of that decision by the Wisconsin Supreme Court was denied on February 20, 1990. *Id.* at 153 Wis. 2d xlix (1990). Petitioner now seeks a writ of certiorari to the Wisconsin Supreme Court. Respondents oppose the petition because (1) it is unsuitable for Supreme Court review, and (2) it is frivolous.

REASONS FOR DENYING THE PETITION

I. THE PETITION IS NOT SUITABLE FOR SUPREME COURT REVIEW

A. The Petition Does Not Comply With Supreme Court Rule 10.

The petition for certiorari in this case fails to present any valid reason for invoking this Court's jurisdiction. The Court's own rules expressly restrict such review only to a limited class of cases where "there are special and important reasons therefor." Sup. Ct. R. 10. Moreover,

review on a petition for a writ of certiorari "is not a matter of right . . ." *Id.*

Rule 10 establishes the considerations governing the granting of a petition for a writ of certiorari to a state supreme court as follows:

- (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
- (c) When a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Judged by the standards of Rule 10, the petition must be denied. It fails to identify a single decision "of another state court of last resort or of a United States court of appeals" that conflicts with the Wisconsin courts' decision on any federal question. Similarly, it fails to identify any important and unresolved question of federal law that should be settled by this Court. Finally, it fails to identify a single decision of this Court which conflicts in any way with the decision of the Wisconsin courts. Consequently, the petition does not satisfy the Court's own criteria for review and should be denied.

The Wisconsin Supreme Court previously examined petitioner's request for review by that court under standards similar to those in Sup. Ct. R. 10. *See* Rule 809.62(1), Wis. Stats., which authorizes discretionary review by the Wisconsin Supreme Court "only when special and important reasons are presented." Petitioner made similar claims there as a basis for review, but the Wisconsin Supreme Court denied his petition for review, correctly concluding that no significant constitutional issue was presented. Respondents urge this Court to do likewise.

B. The Petition Raises Issues Not Presented To The Appellate Courts Below.

Petitioner raises two issues which were not presented to either the Wisconsin Court of Appeals or to the Wisconsin Supreme Court:¹ (1) the alleged foreign ambassadorial stimulus to the initiation of this litigation (Petition at 6); and (2) the Seventh Amendment claim (as opposed to the Wisconsin Constitution claim that he did present) that petitioner should have been accorded a trial by jury (Petition at 8-10). Petitioner's failure to present these issues to the state appellate courts contravenes the Court's general rule that the Supreme Court will not grant certiorari to review an issue that was not raised in the proceedings below, regardless of whether it otherwise satisfies the general criteria for review. *Tennessee v. Dunlap*, 426 U.S. 312, 314, n.2 (1976); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194, n.13 (1976). Consequently, the Court should decline to consider these issues here for the first time.

C. The Supreme Court Does Not Review State Court Decisions Based Upon Purely State Law Grounds.

Next, petitioner complains that De Rance funded the respondents' litigation, but failed to adequately indemnify him for his legal expenses.² Petition at 6. Again, petitioner fails to cite a single case or statute to provide any legal support for converting his lack of access to private corporate funds into a violation of the Due Process Clause of the Fourteenth Amendment. The corporate indemnification issue was correctly decided by the state courts

¹ Petitioner did raise both issues in the trial court. They were decided adversely to him.

² Petitioner falsely claims that respondents spent in excess of \$5,000,000 in corporate funds to pursue this litigation. This figure is a gross exaggeration of the actual amount. No evidence was presented to the trial court on the amount of funds so expended. There is no basis in the record for such an outlandish claim by petitioner.

below on state statutory grounds. Petitioner does not allege that Wisconsin's corporate indemnification statutes are unconstitutional. His failure to obtain private corporate indemnification does not even remotely implicate a question of federal law. Accordingly, it is beyond review by this Court. Sup. Ct. R. 10.

D. The Supreme Court Does Not Evaluate Testimony Or Weigh Competing Evidence Presented To The Trial Court.

Petitioner also complains of an alleged due process violation because of the trial court's supposed "disregard of all the expert testimony adduced on behalf of the petitioner during the trial." Petition at 7. This contention likewise presents no basis for Supreme Court review. In *N.L.R.B. v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951) this Court stated:

This is not the place to review a conflict of evidence nor to reverse a [lower court] because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony . . .

This Court's review of the trial court record for the purpose of evaluating testimony or weighing competing evidence is singularly inappropriate where, as here, the trial record runs to some 23,000 pages. The Court should decline to substitute its judgment for that of the state court trial judge who patiently heard and saw the testimony of seventy-five witnesses over the course of a five month trial.

II. PETITIONER'S CONSTITUTIONAL CLAIMS ARE FRIVOLOUS

A. Petitioner Does Not State A Violation Of The Due Process Clause.

Instead of complying with the requirements of Rule 10, petitioner has elected to premise his request for review on frivolous claims that are utterly devoid of constitutional significance. For example, citing no legal authority at all, petitioner states that the Wisconsin court proceedings deprived him of due process because they were "stimulated if not directed by an ambassador of a foreign government." Petition at 6. Even if this were true, such a contention is of no legal, much less constitutional, significance.

Petitioner also claims a deficiency in due process in that "the trial judge was not impartial . . . [because] he was a communicant of the Roman Catholic Church and had had prior knowledge of the defendant." Petition at 7. Petitioner fails to explain why, if these facts troubled him, he did not avail himself of his statutory right to compel the automatic substitution of the trial judge pursuant to sec. 801.58 Wis. Stats. Furthermore, it should be pointed out that the petitioner sued the state trial court judge in federal court alleging this very claim of bias among other allegations. Petitioner's suit was dismissed and petitioner himself was fined \$1,000 pursuant to Fed. R. Civ. P. 11. His appeal of the dismissal and sanctions was itself dismissed as frivolous. *John v. Barron*, 897 F.2d 1387 (7th Cir. 1990).

B. The Seventh Amendment Does Not Guarantee A Jury Trial In A State Equity Proceeding.

In the state appellate courts, petitioner claimed that he had a right under the Wisconsin Constitution to trial by jury in this civil case. Having lost on this issue in the lower courts, petitioner now reverses field and claims

that he was entitled to a jury trial because the trial court should have overruled this Court and held the Seventh Amendment applicable to state court proceedings. This argument is frivolous for two independent reasons.

First, this Court has repeatedly held that the Seventh Amendment's right to a jury trial in a civil case is one of the rights not incorporated into the Due Process Clause of the Fourteenth Amendment. In *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 219 (1916), Chief Justice White, speaking for a unanimous court, held that "the [Seventh] Amendment does not relate to proceedings in such [state] courts." Seven years later, Chief Justice Taft, again writing for a unanimous court, held that "the deprivation of a right of trial by jury in a state court does not deny the parties due process of law under the Federal Constitution." *Wagner Co. v. Lyndon*, 262 U.S. 226, 232 (1923). Petitioner concedes this is a well-settled rule of Seventh Amendment jurisprudence. Petition at 8. He offers no legitimate reason for departing from this long-standing principle of constitutional law.

Second, even if this Court were to abandon the bar to the Seventh Amendment's applicability to the states, petitioner would still not be entitled to a jury trial because there is no right to a jury in a proceeding in equity.³ This has been the rule since before the founding of the Republic. *The Federalist* No. 83 (A. Hamilton). It was reiterated by this Court most recently in a unanimous decision in *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977). There the court held that:

The phrase 'suits at common law' has been construed to refer to cases tried prior to the adoption of the

³ In the trial court, respondents' only requests for relief were equitable, i.e., an injunction removing petitioner from his corporate offices, and a decree of equitable disgorgement of illegal profits from his prohibited acts of self-dealing.

Seventh Amendment in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not.

430 U.S. at 449. As the Court further explained:

The Seventh Amendment was declaratory of the existing law, for it required only that jury trial in suits at common law was to be 'preserved.' It thus did not purport to require a jury trial where none was required before. Moreover, it did not seek to change the fact finding mode in equity . . .

430 U.S. at 459. This Court should decline petitioner's invitation to overturn the Seventh Amendment's historic distinction between suits at common law and proceedings in equity.

C. The First Amendment Does Not Guarantee A Right To Defraud A Tax-Exempt Charity.

Petitioner next contends that the trial court should not have acted to curb his fraudulent and wasteful misconduct because his "First Amendment right to free exercise of his religion was significantly impaired by the state action." Petition at 10.

Petitioner would have this Court believe that when he engaged in his repeated acts of securities fraud, tax fraud, perjury, corporate fraud, self-dealing, conflicts of interest, lying, breaches of fiduciary duty, deception and disobedience of the board of directors, waste, and mismanagement, petitioner was merely exercising his sincere and deeply held religious beliefs.

It is a well established principle of First Amendment jurisprudence that an individual may not use the Free Exercise Clause as a cloak for criminal or fraudulent behavior. This familiar rule was restated in a case decided just eight weeks ago, *Employment Div., Dept. of Human Resources of Oregon v. Smith*, — U.S. —,

110 S. Ct. 1595 (1990). There the court stated:

We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.

110 S. Ct. at 1600. Similarly, in *United States v. Moon*, 718 F.2d 1210, 1227 (2d Cir. 1983), the court held:

To foreclose a court from analyzing a church's activities as needed to determine whether those activities violated a statute, on the grounds that the First Amendment forbids such inquiry, would mean that there are no restraints or limitations on church activities. [citations omitted]. The "free exercise" of religion is not so unfettered. The First Amendment does not insulate a church or its members from judicial inquiry when a charge is made that their activities violate a penal statute.

See also In re Heritage Village Church, 92 Bankr. 1000 (D.S.C. 1988), ordering Rev. Jim and Tammy Faye Bakker to make disgorgement and restitution of \$6 million for self-dealing, waste, and breach of fiduciary duties relative to a tax-exempt church.

There is no First Amendment right to lie, cheat, and steal from a tax-exempt charity. Petitioner's purported First Amendment claim is frivolous on its face. It does not deserve review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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